Supreme Court, U.S.
FILED

04-740 NOV 29 2004

OFFICE OF THE CLERK

No. 04-

In the

Supreme Court of the United States

SSA GULF, INC.,

PETITIONER,

v.

ROOSEVELT MAGEE,

RESPONDENT.

On Petition For a Writ Of Certiorari To
The U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD P. SALLOUM
FRANKE, RAINEY & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
(228) 868-7070

JONATHAN S. MASSEY
Counsel of Record
JONATHAN S. MASSEY, P.C.
3920 Northampton St. N.W.
Washington, D.C. 20015
(202) 686-0457

IRA J. ROSENZWEIG
ADAMS, HOEFER, HOLWADEL
& ELDRIDGE, LLC
Pan American Life Center
601 Poydras St., Suite 2490
New Orleans, LA 70130
(504) 581-2606

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the nominal respondent in the court of appeals was the Honorable Kurt D. Engelhardt, Judge, United States District Court for the Eastern District of Louisiana.

The following parties filed responses to the petition for mandamus in the court of appeals: James J. Flanagan Shipping Corporation; Cooper/T. Smith Stevedoring Company, Inc.; Asbestos Corporation Limited.

The following parties were defendants in the district court but did not enter an appearance in the court of appeals: Eagle, Inc.; Boland Machine & Manufacturing Co.; Dixie Machine, Welding & Metal Works, Inc.; Sank, Inc. f/k/a Buck Kreihs Co.; American Sugar Refining, Inc.; BCI Acquisitions, Inc.; P&O Port Gulfport, Inc. f/k/a Atlantic & Gulf Stevedores, Inc.

RULE 29.6 STATEMENT

Petitioner SSA Gulf, Inc., formerly known as SSA Gulf Terminals, Inc. and Ryan-Walsh Stevedoring, states that its parent company is SSA Marine, Inc. No publicly held company owns more than 10% of SSA Gulf's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT OF THE CASE 2

1. Statutory Background 2

2. Proceedings in this Case 3

REASONS FOR GRANTING THE WRIT 5

A. The Decisions Below Conflict With A Holding Of The Fourth Circuit 8

B. The Decisions Below Conflict With Governing Precedent of this Court Regarding the "Complete Preemption" Doctrine 10

1. The Courts Below Applied An Obsolete Legal Standard Regarding The Complete Preemption Doctrine 11

2. This Court Should Grant Review To Continue To Clarify The Complete Preemption Doctrine 15

C. Under the Proper Legal Test, The LHWCA Triggers Complete Preemption 16

1. The Text and Structure of the LHWCA 16

2. The Legislative History of the LHWCA 18

D. The Decision Below Threatens a Substantial Disruption of the LHWCA Statutory Scheme 22

E. Section 1447(d) Does Not Preclude Review 25

CONCLUSION 28

Appendix A: Order of the U.S. Court of Appeals for the Fifth Circuit 1a

Appendix B: Order of the U.S. District Court for the Eastern District of Louisiana 2a

TABLE OF AUTHORITIES

Cases **Page**

Aaron v National Union Fire Ins. Co., 876 F.2d 1157 (5th Cir. 1989), *cert denied*, 493 U.S. 1074 (1990) 14
Aetna Health Ins. v. Davila, 124 S. Ct. 2488 (2004) 5, 11-13, 15, 28
Aliota v. Graham, 984 F.2d 1350 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993) 25
Artis v. Norfolk & Western Ry., 204 F.3d 141 (4th Cir. 2000) 9
Atlantic Transportation Co. v. Imbrovek, 234 U.S. 52 (1914) 18
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) .. 10
Ben & Jerry's Homemade, Inc. v. KLLM, Inc., 58 F. Supp. 2d 315 (D. Vt. 1999) 16
Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) . 11-15
Blab T.V., Inc. v. Comcast Cable Communs., Inc., 182 F.3d 851 (11th Cir. 1999) 15
Borneman v. United States, 213 F.3d 819 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) 24
Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296 (2d Cir. 2004) 15
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 10
Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 17
Circle Redmont, Inc. v. Mercer Transp. Co., 78 F. Supp. 2d 1316 (M.D. Fla. 1999) 16
Darcangelo v. Verizon Communs., Inc., 292 F.3d 181 (4th Cir. 2002) 16
Ervast v. Flexible Prods. Co., 346 F.3d 1007 (11th Cir. 2003) 15
Falkowski v. Imation Corp., 309 F.3d 1123 (9th Cir. 2002) 16

Cases (continued) **Page**

Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983) 10-11
Gallea v. United States, 779 F.2d 1403 (9th Cir. 1986) ... 25
Garcia v. Amfels, Inc., 254 F.3d 585 (5th Cir. 2001) 4
Gravatt v. City of New York, 226 F.3d 108 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001) 9
Hurt v. Dow Chem. Co., 963 F.2d 1142 (8th Cir. 1992) ... 16
In re Adams, 809 F.2d 1187 (5th Cir. 1987) 25
In re CSX Transportation, Inc. v. Shives, 151 F.3d 164 (4th Cir. 1998) 8, 26
In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) 27
Ingalls Shipbuilding v. Director, Office of Workers' Compensation Programs, DOL, 519 U.S. 248 (1997) ... 3
International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) 18-19
Kircher v. Putnam Funds Trust, 373 F.3d 847 (7th Cir. 2004) 26
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) ... 19
Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033 (9th Cir. 2003) 15
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) .. 10
Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291 (1995) 2
Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990) 25
Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 461 U.S. 624 (1983) 23
Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990) 27
Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 20
Norton v. Warner Co., 321 U.S. 565 (1944) 17

Cases (continued) **Page**

Poore v. American-Amicable Life Ins. Co., 218 F.3d 1287 (11th Cir. 2000) 25
Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) 23
Powers v. Southland Corp., 4 F.3d 223 (3d Cir. 1993) 25
Rivet v. Regions Bank of La., 522 U.S. 470 (1998) 11
Robinson v. Michigan Consol. Gas Co., 918 F.2d 579 (6th Cir. 1990) 16
Rosciszewski v. Arete Assocs., 1 F.3d 225 (4th Cir. 1993) . 16
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) 19-20
Sample v. Johnson, 771 F.2d 1335 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986) 9
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 19
Sonoco Prods. Co. v. Physicians Health Plan, Inc., 338 F.3d 366 (4th Cir. 2003) 15
South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) 17
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 18
Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116 (2d Cir. 2003) 15
Stewart v. Dutra Constr. Co., 343 F.3d 10 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 1414 (2004) 9
Stowers v. Consolidated Rail Corp., 985 F.2d 292 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993) 9
Strong v. Telectronics Pacing Sys., 78 F.3d 256 (6th Cir. 1996) 15
Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946) 19
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 26
Trans World Airlines v. Mattox, 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990) 16
Waco v. United States Fidelity & Guar. Co., 293 U.S. 140 (1934) 24

Cases (continued) **Page**

Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924) . 19
Xiong v. Minnesota, 185 F.3d 424 (8th Cir. 1999) 25

Statutory Materials **Page**

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 4
28 U.S.C. § 1441(b) 4
28 U.S.C. § 1447(d) 24-27
Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq* ... *passim*
33 U.S.C. § 902 2
33 U.S.C. § 903 2
33 U.S.C. § 904 2
33 U.S.C. § 905(a) 1, 3, 17
33 U.S.C. § 908 ..... 2, 22
33 U.S.C. § 909 ..... 2, 22
33 U.S.C. § 910 22
33 U.S.C. § 913 2
33 U.S.C. § 914 ..... 2, 16
33 U.S.C. § 919 2
33 U.S.C. § 920 2
33 U.S.C. § 921 ..... 2, 10
33 U.S.C. § 922 3
33 U.S.C. § 928 3
33 U.S.C. § 933 2
33 U.S.C. § 938 18
33 U.S.C. § 939 2
46 U.S.C. § 688 18
H.R. Rep. No. 92-1441, 92d Cong., 2 Sess. (1972) 19-21
S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 19-21
118 Cong. Rec. 36383 (1972) 23

Miscellaneous **Page**

20 C.F.R. §§ 701-704 . . . . . 3, 18
American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2002) 27
American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2003) 22
Richard H. Fallon, Jr. et al., THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. Supp. 2003) 15

PETITION FOR WRIT OF CERTIORARI

Petitioner SSA Gulf, Inc. ("SSA Gulf") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's order (Pet. App. 1a) denying the petition for writ of mandamus is unreported. The opinion of the district court (*id.* 2a) is also unreported.

JURISDICTION

The order of the court of appeals was entered on October 5, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 5 of the Longshore and Harbor Workers' Compensation Act ("LHWCA") provides in relevant part:

> The liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death.

33 U.S.C. § 905(a).

STATEMENT OF THE CASE

1. Statutory background.

The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*," is a comprehensive scheme to provide compensation 'in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States,'" including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 294 (1995) (quoting 33 U.S.C. § 903(a)). The Act focuses primarily on such occupations as longshore and harbor workers, ship repair personnel, shipbuilders, and shipbreakers. Under the LHWCA, nonseaman maritime workers, as defined in § 902(3), are afforded no-fault workers' compensation claims against their employers, *see* § 904(b) and negligence claims against vessels, *see* § 905(b), for injury and death.

The LHWCA creates a comprehensive scheme for claims by eligible workers. The program is administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs. 33 U.S.C. § 939. The Act prescribes detailed procedures for the filing and processing of claims. §§ 913-14, 919-20. Any claim for benefits must proceed exclusively before an administrative law judge ("ALJ"), and any challenge to the ALJ's ruling must first be reviewed by the Benefits Review Board ("Board"). §§ 919(a), 921(b). Any appeal from the Board's decision must be filed in a United States Court of Appeals. § 921(c).

The LHWCA provides formulae for the computation of benefits for disability or death based on the employee's weekly wages. §§ 908-09, 910. The Act contains rules for the payment of compensation where third parties may be liable, § 933; for the

modification of awards, § 922; and for the regulation of attorneys' fees. § 928.

Under the authority of the LHWCA, the Secretary of Labor has promulgated a detailed set of regulations implementing all portions of the Act. *See* 20 C.F.R. §§ 701-704. The regulations provide rules for claims relating to occupational diseases. § 702.602-604. This Court has recognized that a shipfitter suffering from employment-related asbestos disease is entitled to administrative compensation from his employer under the LHWCA. *See Ingalls Shipbuilding v. Director, Office of Workers' Compensation Programs, DOL*, 519 U.S. 248, 251 (1997).

The regulations also address the procedures for the payment of uncontested claims, 20 C.F.R. § 702.231; the entry of settlement agreements, §§ 702.242-243; and the processing of controverted claims, §§ 702.251-274, 301-349. The rules governing the conduct of formal hearings include provisions regarding depositions, interrogatories, evidence, witnesses, oral arguments, and written submissions. The regulations also provide for the modification of compensation awards and payment of supplemental compensation. § 702.372-373.

The comprehensive statutory framework does not permit a longshore worker to sue a stevedore employer for tort damages in state court. Indeed, central to the LHWCA is the exclusivity provision of Section 5, which provides that the liability of an employer under the LHWCA "shall be exclusive and in place of all other liability" to the employee, "his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." § 905(a).

2. Proceedings in this case.

Respondent filed the instant lawsuit in Louisiana state court, Orleans Parish. The Petition for Damages alleged that, while

Roosevelt Magee was employed as a longshoreman with SSA Gulf and other stevedoring companies, he loaded and unloaded asbestos cargo at the Port of New Orleans. According to the lawsuit, exposure between 1965 and 1997 contributed to certain asbestos-related diseases, including lung cancer. The lawsuit seeks special, general, and exemplary damages.

SSA Gulf timely removed this case under 28 U.S.C. § 1441(b), on the grounds that the LHWCA wholly displaces and preempts state-law tort claims against stevedore employers so as to come within federal question jurisdiction pursuant to 28 U.S.C. § 1331. The removal was joined by all defendants who had been served at the time of removal. By separate pleadings, petitioner and other stevedore defendants filed a Rule 12(b)(6) motion to dismiss on the ground that the LHWCA, as respondent's sole and exclusive remedy, completely preempts any state-law claims against stevedore employers.

Plaintiff moved to remand, arguing that the LHWCA "cannot be fairly understood as preempting state remedies." "The availability of a federal remedy does not necessarily foreclose an injured worker's claim for relief under state law." According to the plaintiff, the LHWCA "contains no express declaration of Congressional intent to prohibit states from providing compensation to injured workers in lieu of, or in addition to the benefits provided under the LHWCA." Plaintiff concluded by contending that, "[w]ith concurrent jurisdiction, an injured worker has the option of pursuing a claim for remedies under either state law or federal law. In this case, plaintiff chose to pursue a state remedy for his injuries, which include actions in tort."

The district court entered an order of remand without deciding whether the LHWCA completely preempts state-law claims against stevedore employers and without reaching petitioner's Rule 12(b)(6) motion to dismiss based upon the exclusive remedy provisions of the LHWCA. Pet. App. 2a.

Instead, the district court entered a remand order adopting the reasoning of *Hernandez v. Todd Shipyards*, 2004 WL 1543184 (E.D. La. 2004). The district court in *Hernandez* held that the LHWCA does not provide a basis for removal of purely state-law claims. "[T]he LHWCA contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court." *Id.* at *4.

SSA Gulf filed a petition for writ of mandamus presenting the question whether the LHWCA creates federal question jurisdiction for removal purposes because it completely preempts state-law tort claims against stevedore employers. Respondent filed a response attaching its district court motion to remand. By order of October 5, 2004, the Fifth Circuit denied the petition. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This case presents the question whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331. The decision below squarely conflicts with a holding of the Fourth Circuit, as well as with governing precedent from this Court regarding the "complete preemption" doctrine.

Further, the decision below threatens a substantial disruption of the LHWCA scheme by enabling state courts – including state-court judges and *juries* – to decide questions of LHWCA benefits and coverage in inconsistent and non-uniform ways. The decision below cannot be reconciled with the holdings of this Court and at least eight other circuits recognizing that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees.

The disruption of the statutory scheme is real rather than hypothetical. The impact is illustrated by a recent petition for certiorari presenting the same question as this case. *See* No. 04-327, *petition for cert. denied* (Nov. 15, 2004) ("*Hernandez*"). In *Hernandez,* SSA Gulf warned that "[a]bsent corrective action by this Court, it is clear that stevedore employers will face a flood of state-court tort lawsuits seeking enormous damage awards in plain violation of the statutory command of the LHWCA." Petition for Writ of Certiorari in No. 04-327, at 20.

The instant case shows that the flood of new cases is already underway. Unless the Fifth Circuit's error is corrected, plaintiffs will continue filing state-court tort suits against stevedore employers in Louisiana state court and other notorious anti-defendant venues, with the intent of circumventing the LHWCA's exclusive remedy provisions.

Accordingly, the denial of certiorari in No. 04-327 does not militate in favor of denial of certiorari here. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). "We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard." *Daniels v. Allen*, 344 U.S. 443, 491 (1953) (Frankfurter, J.).

The cases are legion in which this Court has granted certiorari after initially denying the writ in a previous case presenting the same legal question.[1] Such a process is inevitable in a system in

---

[1] *E.g.*, *United States v. Lara*, 124 S. Ct. 1628, 1632 (2004); *Illinois v.*

which this Court encourages percolation of issues in the lower courts. Here, the Fifth Circuit has demonstrated that its *Hernandez* decision was not aberrational. The Fifth Circuit has made clear that it will adhere to its erroneous legal position and will continue to allow state-court plaintiffs to frustrate the exclusivity provision of the LHWCA.

Hence, the Fifth Circuit's decision in this case confirms the palpable threat to the LHWCA's statutory scheme. Because the rule in this case conflicts with decisions of this Court and of numerous other circuits, this Court's plenary review is urgently needed. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Although this Court's decision in *Davila* was issued prior to the Fifth Circuit order in this case, and although SSA Gulf's petition for mandamus cited *Davila*, the Fifth Circuit's order is inconsistent with *Davila*.[2]

Lidster, 540 U.S. 419 (2004); *United States v. Knights*, 534 U.S. 112, 116 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2004); *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 9 (2000); *Farragher v. City of Boca Raton*, 524 U.S. 775, 785 (1998); *Monge v. California*, 524 U.S. 721, 729 (1998); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163 (1998); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 759 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 n. 1 (1994).

[2] This Court has frequently GVR'ed cases even whether the lower court decision was issued after the governing Supreme Court opinion. *See, e.g.*, No. 97-8284, *Schweninger* v. *Minnesota*, 525 U.S. 802 (1998) (remanded in light of *Kansas* v. *Hendricks*, 521 U.S. 346 (1997)); No. 97-7931, *Coleman* v. *Minnesota*, 524 U.S. 924 (1998) (same); No. 97-5901, *Hodgkiss* v. *United States*, 522 U.S. 1012 (1997) (remanded in light of *Bailey* v. *United States*, 516 U.S. 137 (1995)); No. 90-1936, *Parker Solvents* v. *Royal Ins. Cos. of Am.*, 502 U.S. 801 (1991) (remanded in light of *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), decided a few days before lower court's decision); No. 90-524, *Connecticut* v. *Geisler*, 498 U.S. 1019 (1991) (remanded in light of *New York* v. *Harris*, 495 U.S. 14 (1990), decided three weeks before lower court's opinion); No. 89-5991, *Patterson* v. *South*

A. The Decision Below Conflicts With A Holding Of The Fourth Circuit.

The rule followed below is inconsistent with the decision of the U.S. Court of Appeals for the Fourth Circuit in an indistinguishable case. Certiorari is therefore amply warranted.

In *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998), the Fourth Circuit held that a federal district court erred in remanding to state court a lawsuit by a harbor worker against his employer. The Fourth Circuit held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. "An LHWCA claim must be filed with the Department of Labor where it is assigned to an administrative law judge whose decision is reviewed by the Benefits Review Board. Review by the courts is authorized through a petition for review, which may be filed only in the [federal] courts of appeals . . . ." *Id.* at 171. State courts "do not have jurisdiction over LHWCA cases." *Id.* The Fourth Circuit explained that, "if we were to [remand this case to state court], we would be committing the federal question of LHWCA coverage to the state court when Congress intended that it be decided exclusively in federal court." *Id.* The court of appeals opined that, because the LHWCA administrative remedy is exclusive, the only proper course was dismissal of the case: "the district court should not have remanded the case to state court, but should have dismissed it." *Id.*

The decision below is utterly irreconcilable with the holding of the Fourth Circuit in *Shives*. The Fourth Circuit held that, when a state-court action against a stevedore employer is

---

Carolina, 493 U.S. 1013 (1990) (remanded in light of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987)); No. 89-401, *Wecht* v. *Inmates of Allegheny County*, 493 U.S. 948 (1989) (remanded in light of *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981)).

removed to federal district court, the proper remedy is dismissal, not remand. The courts below followed the opposite rule. In the Fourth Circuit, longshore and harbor workers who attempt to file state-court actions against their employers will properly be remitted to their administrative remedies. Under the rule followed in the case at bar, longshore and harbor workers will instead be allowed to pursue their tort actions in the state courts, subject only to this Court's discretionary review via its certiorari jurisdiction. State-court judges and potentially state-court juries will decide issues of LHWCA benefits and coverage.

Circuit-to-circuit variation in the administration of the LHWCA would be intolerable. Shipping is inherently an interstate and indeed international form of commerce. Operations cannot be confined to the boundaries of a particular state or judicial circuit. If stevedore activities in New Orleans and South Carolina are subject to different rules, then commerce will be hampered, and Congress' goal of a uniform national system of compensation will be frustrated.

The decision below is not only in conflict with the holding of the Fourth Circuit; it is also in tension with the rulings of at least eight other circuits holding that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees. *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 1414 (2004); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938-39 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S.

1026 (1991).

This Court's review is therefore amply warranted.

B. The Decision Below Conflicts With Governing Precedent of this Court Regarding the "Complete Preemption" Doctrine.

Certiorari is necessary for a further reason: The rule in this case conflicts with decisions of this Court regarding the "complete preemption" doctrine. This doctrine reflects the recognition that, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

This Court first recognized the complete preemption doctrine in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). In *Avco*, an employer sought an injunction in state court to bar the defendant labor union from striking. The union removed the suit to federal court, and this Court upheld the removal, opining that Section 301 of the Labor Management Relations Act ("LMRA") so completely preempts state law that the employer's complaint should be considered as arising under Section 301. 390 U.S. at 560. The necessary ground of decision in *Avco* was that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd. of Cal. v.*

Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 23-24 (1983). *See also Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law") (internal quotation marks omitted).

In recent years, this Court has issued two important decisions revising and clarifying the complete preemption doctrine. In *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), this Court held that causes of action for usury filed in state courts against national banks are removable to district court under § 1441(b) as "arising under" federal law – even when federal law is not mentioned in the complaint. Most recently, this Court invoked the complete preemption doctrine in *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004), which held that when a federal statute (in that case, ERISA) completely preempts a state-law cause of action, the state case may be removed to federal court.

In both *Beneficial Nat'l Bank* and *Davila*, this Court instructed that the principal focus of complete preemption should be on whether the federal statutory scheme comprehensively displaces the state law at issue. The rulings of the courts below cannot be reconciled with this Court's decisions, particularly its recent holdings.

1. The Courts Below Applied An Obsolete Legal Standard Regarding The Complete Preemption Doctrine.

The district court in this case adopted the reasoning in *Hernandez* that the LHWCA does not create federal question jurisdiction because it "contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court" and "does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA." 2004 WL 1543184, *4. The

district court's description of the LHWCA was inaccurate because the LHWCA does in fact contain provisions for federal court review and for the enforcement of federal rights. The Act provides that "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals." § 921(c). The LHWCA also provides that district courts may enforce federal rights under the Act by issuing injunctions against employers not in compliance with compensation orders. *See* § 921(d).

Moreover, the legal standard followed by the courts below conflicts with this Court's precedent – particularly the recent decisions of *Beneficial National Bank* and *Davila*. These recent decisions have refined and clarified the complete preemption doctrine by making clear that the relevant issue is Congress' intent to completely displace state law through the enactment of a comprehensive statutory scheme. In *Beneficial National Bank*, for example, this Court made clear that the existence of a comprehensively preemptive federal statute means that any assertion of a state-law cause of action necessarily raises a federal question: "When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b) . . . ." 539 U.S. at 8.

This Court reaffirmed the same principle in *Davila*: "When a federal statute wholly displaces the state-law cause of action through complete pre-emption, the state claim can be removed." 124 S. Ct. at 2495 (internal quotation marks omitted). Thus, by creating a comprehensive federal scheme providing the exclusive remedy against stevedore employers, and by eliminating all related state-created rights, the LHWCA gives rise to federal question jurisdiction under the complete preemption doctrine.

Tellingly, in both *Beneficial National Bank* and *Davila*, this

Court focused on the federal interest in preserving the uniformity of a comprehensive statutory scheme – the same federal interest that lies at the heart of the LHWCA. In *Beneficial National Bank*, this Court observed that "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." 539 U.S. at 10 (internal quotation marks omitted). "The same federal interest . . . supports the established interpretation of [the National Bank Act] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction." *Id.* at 11.

In *Davila*, this Court pointed to "Congress' purpose [in ERISA] of creating a comprehensive statute for the regulation of employee benefit plans." 124 S. Ct. at 2495. "Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.*

Precisely the same reasoning is applicable in the context of the LHWCA, which creates a comprehensive federal scheme that (as discussed further in Part D, *infra*) would be disrupted by state-court causes of action. Congress plainly intended the LHWCA administrative remedy to be exclusive.

Although the statutes at issue in *Beneficial National Bank* and *Davila* contained federal private rights of action, nothing in this Court's reasoning indicated that the presence of a federal "civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court" (*Hernandez*, 2004 WL 1543184, *4) was a *sine qua non* of the complete preemption doctrine. This Court should grant review in this case to make clear that the existence of a civil enforcement section that confers a private cause of action is merely an indicator of Congress intent, not an independent requirement of complete preemption. Indeed, in the case of a workers' compensation

statute like the LHWCA, it makes little sense to examine the federal statute for evidence of "a federal cause of action that could be litigated in either federal or state court." *Id.* The entire thrust of an administrative compensation scheme like the LWHCA is *not* to create a judicially enforceable damages action but rather to keep claims *out of the courts.* Instead of trying to identify congressional intent, the courts below affirmatively frustrated it. The LHWCA's creation of an exclusive federal remedy in the form of a right to administrative compensation should have been enough to satisfy the complete preemption doctrine.

Nor does the complete preemption doctrine require a "specific jurisdictional grant to the federal courts," as the district court in *Hernandez* erroneously asserted. 2004 WL 1543184, *4. In fact, in *Beneficial Nat'l Bank*, this Court instructed that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." 539 U.S. at 9 n.5.

To the extent that various dated Fifth Circuit decisions say otherwise, they are contrary to the recent decisions of this Court and further underscore the need for this Court's review. For example, the district court in *Hernandez* relied extensively on *Aaron v National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990), which opined that "the preemptive force necessary to create removal jurisdiction should only be held to exist when 'Congress has clearly manifested an intent to make causes of action . . . removable to federal court.'" *Id.* at 1163 (quoting *Taylor*, 481 U.S. at 68 (Brennan, J., concurring)). The concurring opinion cited by *Aaron* is plainly *not* the law after *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5, if indeed it ever represented the law. Because the courts below applied an improper legal test that conflicts with governing precedent of this Court, certiorari is amply warranted.

2. This Court Should Grant Review To Continue To Clarify The Complete Preemption Doctrine.

This case presents an ideal opportunity to continue the clarification of the complete preemption doctrine – an effort already begun in *Beneficial National Bank* and *Davila*. Certain lower courts have perceptively recognized that "[t]h[e] analytical framework has been changed by" *Beneficial Nat'l Bank*. *See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 304 (2d Cir. 2004). "Given the Supreme Court's approach in *[Beneficial Nat'l Bank]*, we conclude that it means to extend the complete preemption doctrine to any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action." *Id.* at 305. *See also* Richard H. Fallon, Jr., et al., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 22 (5th ed. Supp. 2003) (reaching the same conclusion).

However, other lower courts have expressed confusion over the complete preemption doctrine, describing it as a "doctrinal minefield." *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1041 (9th Cir. 2003). *See also Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1014 (11th Cir. 2003) (complete preemption doctrine is "often confused"); *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 371 (4th Cir. 2003) ("the doctrines of conflict preemption and complete preemption are important, and they are often confused"); *Blab T.V., Inc. v. Comcast Cable Communs., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999) (noting "a substantial amount of confusion" regarding complete preemption doctrine).

"Courts of appeals differ in their willingness to extend the scope of the complete preemption doctrine." *Strong v. Telectronics Pacing Sys.*, 78 F.3d 256, 259 n.1 (6th Cir. 1996). *Compare Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 n.5 (2d Cir. 2003) (holding that Securities Litigation Uniform Standards Act of 1998 triggers

complete preemption); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir. 2002) (same); *Darcangelo v. Verizon Communs., Inc.*, 292 F.3d 181, 187 (4th Cir. 2002) (ERISA completely preempts some state-law claims but not others); *Rosciszewski v. Arete Assocs.*, 1 F.3d 225 (4th Cir. 1993) (holding complete preemption applies to § 301 of the Copyright Act); *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.) (holding complete preemption applies to § 105(a)(1) of the Airline Deregulation Act), *cert. denied*, 498 U.S. 926 (1990); with *Hurt v. Dow Chem. Co.*, 963 F.2d 1142 (8th Cir. 1992) (refusing to extend complete preemption to the Federal Insecticide, Fungicide, and Rodenticide Act); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579 (6th Cir. 1990) (refusing to extend complete preemption to suits against trustees in bankruptcy); *Circle Redmont, Inc. v. Mercer Transp. Co.*, 78 F. Supp. 2d 1316, 1319 (M.D. Fla. 1999) ("Because the Carmack Amendment's language and history do not manifest an intent to make state law claims removable as Carmack claims, the complete preemption doctrine does not apply to give this Court jurisdiction."); *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58 F. Supp. 2d 315, 318 (D. Vt. 1999) ("Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court.").

The complete preemption doctrine presents important and recurring questions of federal law. This case presents an ideal vehicle for further clarification of the doctrine.

C. Under the Proper Legal Test, The LHWCA Triggers Complete Preemption.

1. The Text and Structure of the LHWCA

This Court's review is necessary to make clear that the LHWCA creates federal question jurisdiction under the proper conception of the complete preemption doctrine. The text of the LHWCA demonstrates that Congress created a comprehensive statutory scheme and did not intend to permit state-court suits for

damages against stevedore employers. Indeed, the LHWCA is, if anything, broader and more comprehensive than other statutes to which this Court has applied the complete preemption doctrine. Section 301 of the LMRA, for example, merely places jurisdiction of labor disputes in the federal district courts. The LHWCA, on the other hand, contains an exclusive remedy section, which provides that the liability of an employer under the Act "shall be exclusive and in place of all other liability" to the employee and "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." § 905(a). This Court has long recognized that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944). The LHWCA "provides scheduled compensation (*and the exclusive remedy*) for injury to a broad range of land-based maritime workers." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995) (emphasis added); *see also South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940) ("For those employees who are entitled to compensation, the remedy under the Act is exclusive."), *overruled on other grounds by McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).

In addition to Section 5, the structure of the LHWCA itself confirms that it completely displaces state law. The LHWCA was established as a uniform national program of workers compensation benefits for longshore and harbor workers. The Act utterly controls the sum total of rights and obligations of insurers, employers, and employees. The sheer comprehensiveness of the federal regulatory scheme confirms congressional intent to preempt state-law tort remedies and to prevent state courts from adjudicating LHWCA benefits and coverage issues in potentially inconsistent fashion. Accordingly, under this Court's precedents, the LHWCA plainly creates federal question jurisdiction under the complete preemption doctrine.

The self-executing nature of the LHWCA provides further

evidence that Congress did not intend for state courts to make determinations of LHWCA benefits and coverage. Unlike some workers compensation statutes that require repeated court enforcement, the LHWCA is almost self-policing. The LHWCA provides for automatic payment of benefits and imposes penalties for an employer's failure to pay benefits. 33 U.S.C. §§ 914, 938. The Secretary of Labor has promulgated detailed regulations governing every portion of the Act. *See* 20 C.F.R. §§ 701-704 Disputes as to compensation awards are to be resolved by the Benefits Review Board, with appeals exclusively to the United States Courts of Appeals. It is difficult to imagine a more comprehensive scheme of federal regulation than the LHWCA. The Act leaves no room for state-court involvement.

2. The Legislative History of the LHWCA

The legislative history of the LHWCA confirms that state courts have no role in the statutory scheme. The legislative history repeatedly makes plain congressional intent that longshore workers should be covered by an exclusive workers' compensation scheme and *not* be permitted to file state-court tort suits against stevedore employers.

Initially, judicial decisions extended protection to longshore workers by allowing them to sue in admiralty. *See Atlantic Transportation Co. v. Imbrovek*, 234 U.S. 52 (1914). This development opened the door for inclusion of longshore workers under the remedies of the Jones Act, 46 U.S.C. § 688. *See International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). As a result, courts excluded longshore workers from state workers' compensation systems. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

Congress reacted by making clear that longshore workers should be limited to administrative compensation remedies and should not be permitted to pursue tort claims under admiralty law. Congress twice tried unsuccessfully to bring longshore workers within state workers' compensation plans, but the courts

held these attempts to be unconstitutional. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). Determined to provide administrative rather than tort remedies for longshore workers, Congress enacted the original Longshoremen's and Harbor Workers' Compensation Act. Act of March 4, 1927, Pub.L. No. 69-803, codified at 33 U.S.C. § 901 *et seq*. Congress provided that the Act was the sole remedy of the longshore worker against an employer and abolished the Jones Act recovery granted to the longshore worker against the employer by *International Stevedoring Co. v. Haverty, supra. See Swanson v. Marra Brothers, Inc.*, 328 U.S. 1 (1946).

At first, the Act allowed a longshore worker to retain an admiralty action against the vessel (rather than employer). Act of March 4, 1927, Pub.L. No. 69-803, § 33, 44 Stat. 1440. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (holding that longshore workers were entitled to the protection of the judicially created warranty of "seaworthiness"). Gradually, the "seaworthiness" doctrine approached strict liability. *See* H.R. Rep. No. 92-1441, 92d Cong., 2 Sess. 4-5 (1972); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8-9 (1972), 1972 U.S. Code Cong. & Admin. News, p. 4698.

However, the availability of an employee's admiralty action *against the vessel* began to threaten the exclusiveness of the Act's remedy *against the employer* because the vessel could pursue a third-party claim against the employer alleging that any injury by the employee was due to the negligence of the stevedoring company and that the stevedoring company had therefore breached its implied warranty of workmanlike performance. In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), this Court held that such a triangular suit did not violate the exclusive liability provision of Section 5, even though it allowed the longshore worker to recover indirectly from the employer more than could be recovered directly through a workers' compensation claim.

In response, in 1972 Congress enacted important reforms to the LHWCA, in order to reaffirm the exclusiveness nature of the employee's administrative remedy against the employer. See *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-62 (1977) (amendments were chiefly for the purpose of strengthening the exclusivity of LHWCA remedies). Congress specifically abolished the seaworthiness standard and eliminated indemnity suits brought against stevedore employers by vessels under *Ryan* and *Sieracki*. Act of October 27, 1972, Pub.L. No. 92-576, § 18, 86 Stat. 1263, amending 33 U.S.C. § 901 *et seq*.

Congress' stated purpose was to remove litigation against employers from the courts. The House Committee Report, for example, expressed concern that judicial interpretations of the Act had led to third-party suits against employers:

> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.

H.R.Rep. No. 92-1441 92d Cong., 2d Sess. 5 (1972), U.S.Code Cong. & Admin. News, p. 4702.

The Senate Report concurred. *See* S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972) ("The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine."). The Senate Report added:

> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual

benefits for injured workers.

Id. at 4. Congress therefore prohibited longshore workers from bringing claims against vessels under the warranty of seaworthiness allowed by *Sieracki* and relieved stevedoring companies of liability from *Ryan*-type indemnity suits brought by vessels. A vessel's liability to longshore workers was limited to cases where its negligence could be proved.

Further, Congress made clear that the negligence remedy against vessels would not disrupt the uniformity of the statutory scheme. The House Report explained that "the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 8 (1972); *see also* S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12 (1972), U.S. Code Cong. & Admin. News, p. 4705. Congress thus quite deliberately opted to create a *uniform* national system – one that would be substantially disrupted if individual state courts and juries were free to determine issues of coverage and to interpret for themselves the LHWCA's exclusive remedies provision.

In short, in 1972 Congress went to considerable lengths to prevent the circumvention of the LHWCA's exclusive remedy by means of *indirect*, third-party suits against stevedore employers. Congress enacted amendments to override judicial decisions that created the spectre of unwarranted litigation against employers. It is simply unthinkable that Congress meant to permit *direct* state-law tort lawsuits by employees against stevedore employers in state court, for such *direct* actions would blatantly obliterate the exclusive remedy provision of the LHWCA, in a manner much more threatening than the seaworthiness and third-party indemnity suits that Congress barred in 1972.

D. The Decision Below Threatens a Substantial Disruption of the LHWCA Statutory Scheme.

This Court's review is urgently needed because this case presents an important question of federal law that should be settled by this Court. *See* Rule 10(c). The rule followed in this case, if left undisturbed, will threaten substantial disruption of the statutory scheme enacted by Congress in the LHWCA. In fact, this case demonstrates that the disruption is already beginning. This case is undoubtedly merely the beginning of the cascade of state-court tort suits against stevedore employers, following the Fifth Circuit's decision opening the floodgates in *Hernandez*. State-court judges and potentially state-court *juries* will be able to decide questions of LHWCA benefits and coverage for themselves. Different state courts will arrive at different results, subject only to review by this Court via its discretionary certiorari jurisdiction. As this case illustrates, employees will forum shop and will file suit in state courts notorious for their anti-defendant biases and large damages awards. It is no accident that this case was filed in state court in Orleans Parish, Louisiana. That forum has been repeatedly identified as one of the top fourteen "judicial hellholes" in the United States by the American Tort Reform Association.[3]

Recognition of state-law claims will inject numerous potentially conflicting standards into an otherwise uniform national system. For example, in this case, respondent's state-court lawsuit seeks special, general, and exemplary damages. These forms of damages are inconsistent with the LHWCA, which provides compensation according to the employee's weekly wages. *See* 33 U.S.C. §§ 908-09, 910. The LHWCA "operates like ordinary workmen's compensation and operates on a percentage of the earnings of an individual rather than

---

[3] *See* American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2 (2002); American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES 8 (2003).

reimbursing him for his actual injury, and puts a lid on his recovery." 118 Cong. Rec. 36383 (1972) (remarks of Rep. Eckhardt).

Allowing state courts into the administration of the LHWCA will be utterly foreign to the congressional design of the statute. Congress created a centralized scheme administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs, with review by the Benefits Review Board, and appeals to the United States Courts of Appeals. The clear purpose of this administrative scheme is to provide uniformity and predictability to employers and employees alike. The rule followed in this case will destroy the uniformity and predictability at the heart of the LHWCA.

The exclusivity provision of Section 5 is a vital part of the LHWCA. "[T]he Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 461 U.S. 624, 635 (1983) (citing H. R. Rep. No. 1767, 69th Cong., 2d Sess., 19-20 (1927)).

The rule followed in this case will upset the balance struck by Congress and will render the broad preemptive effect of Section 5 a virtual nullity. An important purpose of the LHWCA is to "provide employers with definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 281 (1980). "The use of a schedule of fixed benefits as an exclusive

remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible." *Id.* at 282.

Accordingly, the rule followed by the decisions below will substantially disrupt the LHWCA's statutory scheme. This Court's review is urgently needed on this important question of federal law.

E. Section 1447(d) Does Not Preclude Review.

Section 1447(d) of Title 28 provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). Neither the Fifth Circuit's order nor respondent's opposition to the petition for writ of mandamus cited § 1447(d). Nonetheless, even if the Fifth Circuit had expressly relied upon § 1447(d), it would not bar review in this case.

The issue of the proper construction of the LHWCA – and whether it displaces respondent's state-law tort remedy – is antecedent to the question of subject-matter jurisdiction. Indeed, it is separate from the issue of remand: under SSA Gulf's view, the LHWCA required that the district court enforce the exclusivity provisions of the LHWCA by dismissing the plaintiff's petition for damages, not by remanding it to the state court. The issue is not simply the jurisdictional question of whether respondent's state-law tort claims should proceed in federal court or in state court; the issue is whether the tort claims may proceed *at all* in *any* court in light of the LHWCA's exclusivity provisions mandating their dismissal. *See Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (appellate court had power to review issue which "preceded that of remand"); *Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (fact that district court's decision cited § 1447(c) is not sufficient to trigger §

1447(d) because "[t]he district court's conclusion that it did not have subject matter jurisdiction was premised on two antecedent decisions that are both judicially reviewable and appealable"); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir.) (review not barred where a statutory issue under 28 U.S.C. § 2679(d) was the impetus behind the remand, but was also "separate from and logically preceded the question of remand"), *cert. denied*, 510 U.S. 817 (1993); *Mitchell v. Carlson*, 896 F.2d 128, 132-33 (5th Cir. 1990) (finding issue separable and reviewable under *City of Waco*); *In re Adams*, 809 F.2d 1187, 1188-89 (5th Cir. 1987) (same regarding the dismissal of bankruptcy appeal); *Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986) (same regarding dismissal of United States in tort suit).

Section 1447(d) is not automatically triggered merely because the district court's remand order cited § 1447(c) and was purportedly based on lack of subject-matter jurisdiction. *See Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291 (11th Cir. 2000) (remand order based on lack of subject-matter jurisdiction reviewable where "the district court exceeded its authority under § 1447(c)"); *Xiong v. Minnesota*, 185 F.3d 424, 427 (8th Cir. 1999) (where district court held that it lacked subject matter jurisdiction but "case law dictated that jurisdiction was proper at the time of removal," § 1447(d) was no bar to review: "Because the district court remanded a properly removed cause on grounds the court lacked authority to consider, the remand order is reviewable on appeal.").

Accordingly, § 1447(d) does not preclude review of the LHWCA question presented by this case. Otherwise, federal appellate courts would lack authority to protect comprehensive congressional schemes from interference by state courts. *See Powers v. Southland Corp.*, 4 F.3d 223, 229-30 (3d Cir. 1993) (holding that § 1447(d) was no bar to review because, "if there is independent appellate jurisdiction over an issue under the governing federal statutes, the fact that the district court may have remanded the case cannot deprive the court of appeals of

the jurisdiction granted to it by Congress"; "the essence of the defendant federal employee's complaint was that she would be subjected to suit in state court although she had a statutory right to be immune from suit").

The Fourth Circuit recognized the same principle in *Shives*, 151 F.3d at 167. The Fourth Circuit recognized that the LHWCA coverage question was an antecedent issue within the power of the court of appeals to resolve, because leaving the case in the state courts was precisely the harm that Congress was trying to avoid in the statutory scheme:

> If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d), then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals. Thus, because the coverage question of the LHWCA is a conceptual antecedent for the district court's remand order, it would appear that we are not prohibited by § 1447(d) from reviewing that order.

Id. at 167. "If we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a writ of mandamus. To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in [*Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)] for exercise of the writ." *Id.* at 167-68.

Precisely the same reasoning is applicable here. *See also Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004) (finding Section 1447(d) no bar to appellate review because the "specific substantive decision in securities litigation

must be made by the federal rather than the state judiciary", and "if the remand is deemed non-appealable, then a major substantive issue in the case will escape review"); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 844 (3d Cir. 1991), *cert. denied,* 503 U.S. 906 (1992) (district court remand order based on constitutionality of statute was not the kind of remand order meant to be insulated by § 1447(d)); *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990) ("the instant remand order is reviewable by mandamus, since issuance of a remand order at this point in the proceedings was entirely outside the district court's statutory authority" as expressed in the Westfall Act).

Hence, § 1447(d) does not provide a reason to deny review. If anything, any conflict between the Fifth Circuit and the other courts of appeals regarding the interpretation of § 1447(d) would provide a further reason to grant review.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

Respectfully submitted.

RICHARD P. SALLOUM
FRANKE, RAINEY & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
(228) 868-7070

JONATHAN S. MASSEY
Counsel of Record
JONATHAN S. MASSEY, P.C.
3920 Northampton St. N.W.
Washington, D.C. 20015
(202) 686-0457

IRA J. ROSENZWEIG
ADAMS, HOEFER, HOLWADEL
& ELDRIDGE, LLC
Pan American Life Center
601 Poydras St., Suite 2490
New Orleans, LA 70130
(504) 581-2606

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30679

IN RE: SSA GULF TERMINALS, INC., formerly known as Ryan-Walsh Stevedoring, Inc.

Petitioner,

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana, New Orleans

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that petitioner's motion for leave to file petition for writ of certiorari filed in related case 04-30679 into this case is DENIED.

/s/

DATED: October 5, 2004

Appendix B

MINUTE ENTRY
J. ENGELHARDT
AUGUST 5, 2004

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ROOSEVELT MAGEE	CIVIL ACTION
VERSUS	NO. 04-1471
AMERICAN SUGAR REFINING, INC., ET AL.	SECTION "N" (5)

Before the Court is a Motion to Remand filed by plaintiff Roosevelt Magee on June 23, 2004. (Rec. Doc. 25).

Having reviewed the parties' submissions, the record and the applicable law, IT IS ORDERED that plaintiff's motion to remand is GRANTED for the reasons set forth in Judge Africk's July 8, 2004 Order and Reasons in *Hernandez v. Todd Shipyards*, 2004 WL 1543184 (E.D. La.). Accordingly, pursuant to 28 U.S.C. § 1447(c), this action is REMANDED to the Civil District Court for the Parish of Orleans for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that plaintiff's motion for costs, expenses, and sanctions is DENIED. *See id.*

/s/

Date of Entry: August 6, 2004